

RECEIVED

04 MAR 12 PM 4:13

RECEIVED
FEDERAL MARITIME COMM

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**PETITION OF
FEDEX TRADE NETWORKS TRANSPORT & BROKERAGE, INC.
FOR EXEMPTION FROM
THE TARIFF PUBLISHING REQUIREMENTS OF
SECTIONS 8 AND 10 OF THE SHIPPING ACT OF 1984, AS AMENDED**

FMC PETITION NO. P 4 -04

Penelope W. Register
Senior Vice President and
General Counsel
**FedEx Trade Networks Transport &
Brokerage, Inc.**
6075 Poplar Ave, Suite 422
Memphis, TN 38119

Warren L. Dean, Jr.
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, DC 20006-1167

Thomas F. Donaldson, Jr.
Vice President, Legal Department
David W. Spence
Managing Director, Legal Department
Federal Express Corporation
3620 Hacks Cross Road, Bldg. B
Memphis, TN 38125
Phone: 901/434-8578
FAX: 901/434-9289
E-mail: dwspence@fedex.com

Attorneys for
**FedEx Trade Networks
Transport & Brokerage, Inc.**

March 12, 2004

**BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.**

**PETITION OF
FEDEX TRADE NETWORKS TRANSPORT & BROKERAGE, INC.**

Introduction

FedEx Trade Networks Transport & Brokerage, Inc. ("FTN T&B")¹ hereby petitions the Federal Maritime Commission for an exemption from Sections 8 and 10 of the Shipping Act of 1984 and Part 520 of the Commission's Rules to the extent necessary to allow FTN T&B to depart from the provisions of its tariff with individual shippers pursuant to a confidential contract for services.² With this exemption, FTN T&B could enter into agreements with its shipper-customers for ocean transportation services. Such an exemption would have beneficial commercial effects, and be responsive to the preference of shippers for individualized contracts that reflect their shipping needs. It would also enhance competition between vessel operators and FTN T&B, by preventing vessel operators from soliciting customers from surmised tariff information or setting rates that render FTN T&B's pricing structure unprofitable.

FTN T&B seeks this individual exemption from the Shipping Act's tariff publication and adherence requirements to ensure that competing NVOCCs such as United Parcel Service Co., Danzas Corporation, BDP International, Inc., and C.H. Robinson Worldwide, Inc. do not gain a competitive advantage if the Commission

¹ FTN T&B is a wholly-owned subsidiary of FedEx Trade Networks, Inc., which in turn is a wholly-owned subsidiary of FedEx Corporation. FedEx Trade Networks is one of six operating companies that comprise the FedEx group of companies. It holds OTI License No. 0738N/F; Org. No. 018021, publishes an electronic tariff that may be viewed at www.plustariff.com, and maintains the required FMC financial responsibility amounts.

² FTN T&B files this petition pursuant to 46 C.F.R. §§ 502.67 and 502.69.

decides to grant their separate requests. FTN T&B strongly supports the petition of Bax Global and others for rulemaking proceedings to exempt all qualified third-party logistics companies from Shipping Act barriers that prevent them from offering individual transportation agreements with shippers.³ Such a rulemaking would be the most efficient and fair way for the Commission to promote competition under the Shipping Act by placing NVOCCs and VOCCs on equal footing.

However, should the Commission decide not to institute such a rulemaking, FTN T&B asks that the Commission exempt it from the Shipping Act's tariff publishing and adherence requirements. FTN T&B also requests that, if the Commission chooses to initiate a rulemaking proceeding, the Commission should grant it an exemption from the tariff requirements while the rulemaking proceeding is in progress.

1. Statement of Exemption Requested.

FTN T&B⁴ is a sophisticated third party logistics provider helping U.S. importers and exporters satisfy their transportation needs. FTN T&B provides airfreight forwarding, full-service Customs brokerage, trade advisory services, information technology, and e-clearance. FTN T&B is an integral part of FedEx Corporation, a leading global provider of worldwide intermodal cargo transportation, e-commerce, and supply chain management services. In providing these services, the operating companies

³ See generally Reply of FedEx Trade Networks Transport & Brokerage, Inc. in Support of the Petition for Rulemaking, Petition No. P8-03 *et al.* (October 10, 2003).

⁴ For a more extensive description of FedEx Corporation and its subsidiary FedEx Trade Networks, see Reply of FedEx Trade Networks Transport & Brokerage, Inc. in Support of the Petition for Rulemaking, Petition No. P8-03 *et al.* (Oct. 10, 2003) at 4-7.

largely use their own employees, aircraft, vehicles, and loading and unloading equipment. Besides FTN T&B, other operating companies provide air and surface carriage. FedEx Corporation has more than 210,000 employees; its subsidiary, Federal Express Corporation, operates the world's largest fleet of cargo aircraft (643 total), and nearly 65,000 vehicles.

FTN T&B requests that the Commission exempt it from all provisions of the Shipping Act that require NVOCCs to establish, publish, maintain, and enforce tariffs for transportation. In particular, FTN T&B asks that it be exempted from Sections 8(a), (b), (d), and (e) and, to the extent necessary, Section 10(b)(1), (2), (4), (7), and (8) of the Act. This exemption would permit FTN T&B the discretion to depart from the provisions of its tariff and enter into confidential agreements for ocean transportation services with shippers.

FTN T&B would not object to the Commission's applying conditions equivalent to those that govern service contracts under Section 8(c) of the Shipping Act and the Commission's service contract rules at 46 C.F.R. Part 530, including having the Commission retain oversight over its confidential agreements.

2. Exemption Will Not Substantially Reduce Competition and Will Not Be Detrimental to Commerce.

Section 16 of the Shipping Act, as amended by OSRA, authorizes the Commission to grant exemptions when the exemption will not substantially reduce competition and will not be detrimental to commerce. FTN T&B's proposed exemption satisfies these criteria.

First, FTN T&B's proposed exemption would increase competition. If FTN T&B were exempted from the tariff publication and adherence requirements, it would be able to compete more openly and fairly with VOCCs. Further, VOCCs would be unable to solicit FTN T&B customers, which they can often identify through tariffs, or to set rates that make FTN T&B's pricing structure unprofitable. In addition, it would promote competition among shippers, who would be able to negotiate private deals, and prevent disclosure of their transportation costs to competitors.

Second, FTN T&B's proposal would benefit commerce. Eliminating tariff publication would save costs, which shippers today bear. In addition, it would respond to the need of shippers for a flexible, individualized, and confidential response to their shipping needs. The Commission itself has noted the strength of this demand and the rapid changes that occurred once OSRA freed vessel operators from their tariff requirements.⁵

No basis exists for the contention of some commenters that competition will hurt international ocean transportation. First, no other country imposes a tariff regime on NVOCCs, so vessel operators compete with NVOCCs everywhere else in the world today without knowing the NVOCCs' prices. If individual contracting by NVOCCs could destroy international ocean transportation, then it would already have been destroyed. Further, notwithstanding the study prepared for American President Line, Ltd.

⁵ FMC, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 18, 23, and 44.

and APL Co. PTE, Ltd.⁶ no objective evidence exists to support their assertions that ocean common carrier services will dry up if the Commission grants the requested blanket exemption. Rather, economic theory states that, if the supply of vessel capacity shrinks, prices will go up. Increased prices will attract investment, and transportation services will adapt to shipper demand over time.

The APL “study” was interposed to suggest that the Commission requires additional evidence before engaging in rulemaking. Its purpose is to postpone the day when APL must compete on an equal basis in the U.S.-foreign trades with FTN T&B and others — not to enhance reasoned decisionmaking. For example, it suggests that so-called “mega-NVOCC’s” have market power, but the analysis lacks any information about industry concentration or market definition. It also suggests the existence of a public benefit in a direct relationship between shipper and vessel operator, which is neither supported by the Shipping Act nor intuitively obvious. Taken as a whole, the study suggests that the Commission is required to protect competitors and to ensure that an individual participant’s business survives, regardless of market forces. This is simply untrue. —The purpose of economic regulation, as the Department of Transportation has noted, is to “protect competition, not competitors.”⁷ The Commission should disregard the ill-conceived “study” and its claim of careful analysis.

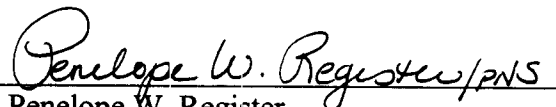
⁶ See comments of American President Line, Ltd. and APL Co. PTE, Ltd. (Jan. 16, 2004).

⁷ Comments of DOT, Petition P3-03 *et al.* (Jan. 16, 2004).

Conclusion

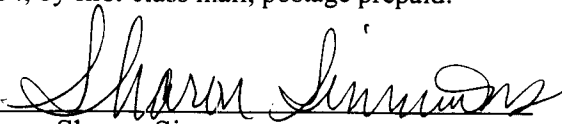
FTN T&B respectfully requests that the Commission exempt it from the tariff requirements of Sections 8 and 10 of the Shipping Act to the extent necessary to allow FTN T&B to depart from those requirements with individual shippers pursuant to a confidential contract for services. FTN T&B strongly supports the institution of a formal rulemaking proceeding to exempt qualified NVOCCs from regulatory requirements that are unresponsive to shippers' needs and that hinder competition in the ocean shipping marketplace. If the Commission chooses institute such a rulemaking, FTN T&B requests a temporary exemption pending resolution of that proceeding.

Respectfully submitted,


Penelope W. Register
Senior Vice President and General Counsel
**FedEx Trade Networks Transport &
Brokerage, Inc.**
6075 Poplar Ave, Suite 422
Memphis, TN 38119

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Petition has been served upon the persons on the following service list, this 12th day of March 2004, by first-class mail, postage prepaid:


Sharon Simmons

Edward D. Greenberg
David K. Monroe
Counsel for the National Customs Brokers
and Forwarders Ass'n of America, Inc.
Galland, Kharasch, Greenberg, Fellman
& Swirsky, P.C.
1054 Thirty-First Street, N.W.
Washington, DC 20007
egreenbe@gkglaw.com
dmonroe@gkglaw.com

Carlos Rodriguez
Counsel for C.H. Robinson Worldwide, Inc.
Rodriguez O'Donnell Ross Fuerst
Gonzalez & Williams, P.C.
1211 Connecticut Avenue, N.W., Suite 800
Washington, DC 20036
rodriguez@rofkw.com

Leonard L. Fleisig
Counsel for Ocean World Lines, Inc.
Troutman Sanders LLP
401 Ninth Street, N.W., Suite 1000
Washington, DC 20004
leonard.fleisig@troutmansanders.com

J. Michael Cavanaugh
Counsel for United Parcel Service, Inc.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, DC 20006
michael.cavanaugh@hklaw.com

Robert L. McGeorge
U.S. Department of Justice
Antitrust Division
Transportation, Energy & Agriculture Section
325 Seventh Street, N.W.
Washington, DC 20530
Robert.mcgeorge@usdoj.gov

Robert T. Basseches
David B. Cook
Eric C. Jeffrey
Counsel for American President Lines, Ltd.
and APL Co. PTE, Ltd.
Shea & Gardner
1800 Massachusetts Avenue, N.W., Suite 800
Washington, DC 20036
rbasseches@sheagardner.com
dcook@sheagardner.com
ejeffrey@sheagardner.com

Charles L. Coleman, III
Counsel for United Parcel Service, Inc.
Holland & Knight LLP
50 California Street, Suite 2800
San Francisco, CA 94111
charles.coleman@hklaw.com

John W. Butler
Counsel for the World Shipping Council
Sher & Blackwell, LLP
1850 M Street, N.W., Suite 900
Washington, DC 20036
jbutler@sherblackwell.com

Edward J. Sheppard
Counsel for BAX Global Inc.
Thompson Coburn, LLP
1909 K Street, N.W., Suite 600
Washington, DC 20006
esheppard@thompsoncoburn.com

Paul S. Smith
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, DC 20590
Paul.smith@ost.dot.gov